Supreme Court, U.S.
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No. 05-1294

IN THE

Supreme Court of the United States

McLANE WESTERN, INC.,
Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF COLORADO;
and M. MICHAEL COOKE and FRED FISHER,
as Executive Directors of the Department of Revenue
of the State of Colorado,
Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals, Division IV

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Does a state tax on activities related to the distribution of a product in the State, which increases because more stages in the distribution chain are located outside the State rather than within the State, impermissibly discriminate against interstate commerce.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to address the proper scope of the Commerce Clause and to challenge State and local legislation that facially discriminates against interstate and/or foreign commerce. *See, e.g., Assoc. Industries of Missouri v. Lohman,* 511 U.S. 641 (1994); *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Finance,* 505 U.S. 71 (1993).

WLF strongly believes that the economic well-being of this country depends on the unrestricted flow of commerce, both interstate and across our nation's borders. WLF is concerned that a discriminatory taxing scheme such as the Colorado excise tax at issue here will encourage other States and local taxing jurisdictions to adopt similar taxing measures that discriminate against and restrict the flow of interstate commerce.

WLF has no direct financial interest in the outcome of this case. It is filing due solely to its interest in ensuring that the tax laws are not permitted to discriminate against interstate commerce. WLF is filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

This case is a challenge to the constitutionality of a Colorado excise tax on the distribution of tobacco products in the State. Petitioner McLane Western, Inc. obtains tobacco products from outside of Colorado relatively late in the distribution chain and distributes them to small Colorado retailers. It is uncontested that Colorado imposes a higher excise tax on McLane than it would on another distributor whose products entered Colorado earlier in the distribution

chain. The question presented is whether this differential taxing scheme constitutes facial discrimination against interstate commerce and thus violates the Commerce Clause.

The Colorado courts granted summary judgment against McLane's challenge. Accordingly, for purposes of this petition, McLane's evidence regarding all material facts should be accepted as true – albeit WLF does not understand that Respondents seriously contest any of that evidence. Rather, the parties' disagreements focus on the legal conclusions to be drawn from the largely uncontested facts.

WLF adopts the Statement of the Case set forth in the Petition. WLF wishes to highlight several additional factual issues, in light of the "Counterstatement of the Facts" set forth in Respondents' opposition brief. First, Respondents make repeated reference to the corporate relationship between the company that manufactures the tobacco products at issue in this case (United States Tobacco Manufacturing Company, Inc. or "UST Manufacturing") and the company that serves as the initial distributor for those products (United States Tobacco Sales and Marketing Company, Inc. or "UST Sales"). Respondents note that UST Manufacturing and UST Sales are subsidiaries of the same parent corporation (U.S. Smokeless Tobacco Co. or "US Smokeless"). Opp. Br. 1. But while Respondents mention that fact repeatedly, evidently in hopes that doing so will somehow diminish McLane's claims, nowhere do Respondents suggest that the transactions between the corporations are anything other than arms-length or otherwise explain how they think the corporate relationship between UST Manufacturing and UST Sales affects the Commerce Clause analysis.

Indeed, the Colorado Court of Appeals made clear that the issue of the relationship between UST Manufacturing and

UST sales had not been raised by the parties and consequently played no role in its decision. Petition Appendix ("Pet. App.") 3a. Accordingly, the Commerce Clause rule established by the courts below applies broadly to all distribution chains, not simply to those involving two or more affiliated corporations; and thus the cert-worthiness of this case is unaffected by the fact that two (non-party) corporations involved in the distribution chain are related.

Second, WLF concurs with Respondents' assessment that "many other states" impose an excise tax on tobacco products in a manner "similar" to Colorado.[2] In WLF's view, the widespread adoption of such excise tax schemes highlights the importance of the issues raised by the Petition.

Third, Respondents state that Colorado wrote its OTP excise tax statute as it did "to ensure that companies cannot avoid their obligation to pay the tax simply by reorganizing into separate manufacturing and supply subsidiaries" and thereby "to achieve the same result no matter what the structure of the manufacturing and supply system from which a distributor purchases OTP." Opp. Br. 3. Respondents supply no citations to support their claim regarding statutory intent, and WLF is aware of nothing in the record that provides such support. Moreover, Respondents' explication of the excise tax statutes is inconsistent with the court of appeals's definitive interpretation. Contrary to Respondents' assertion, the appeals court held that the excise tax would, indeed, be reduced if a distributor purchases OTP from an in-state source,

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[2] The excise tax at issue here imposes a tax on "the sale, use, consumption, handling, or distribution" in Colorado of certain tobacco products – in general, all tobacco products other than cigarettes. Colo. Rev. Stat. § 39-28.5-102. These products are often referred to as "other tobacco products" or "OTP."

and it gave no indication that its analysis would be affected if the in-state source were in some way related to the manufacturer. Pet. App. 6a.

Proceedings Below. McLane filed suit in a Colorado district court, seeking a refund of in excess of $10 million in OTP excise taxes paid between 1991 and 2002. McLane claimed, *inter alia*, that the excise tax violated the Commerce Clause because the tax was approximately twice as high as it would have been had the OTP either been manufactured in Colorado or had entered Colorado at an earlier stage of the distribution process. The district court rejected the Commerce Clause claim and granted summary judgment to Respondents. Pet. App. 14a-24a.

The court of appeals affirmed, finding that the Colorado excise tax on OTP did not violate the Commerce Clause. *Id.* 1a-13a. Rejecting the interpretation of the tax statute espoused by Respondents in this Court, the appeals court agreed with McLane that a distributor's "tax base" – and thus the distributor's total tax bill – "will be higher the later in the distribution network the product is taxed" and that "the location [*i.e.*, either in-state or out-of-state] of the manufacturers, suppliers, or distributors involved in the product's distribution network and the price mark-up of each impacts the tax base or the price upon which the constant twenty percent tax rate is imposed." *Id.* 6a.

The appeals court nonetheless listed several reasons why it did not believe that the excise tax discriminated against interstate commerce in violation of the Commerce Clause. First, the court said that § 39-28.5-102's shifting tax base would not encourage out-of-state manufacturers or distributors (such as UST Manufacturing or UST Sales) to move into Colorado because they "might well" themselves become

subject to the OTP excise tax. *Id.* 7a. Second, the court said that the tax does not discriminate because it is "imposed on an activity within the state, the sale and distribution of OTP, not on the product or the distribution network." *Id.* The court reasoned that the tax could not be deemed discriminatory simply because some distributors may be placed at a competitive disadvantage by being forced to pay a higher tax based on the greater value of the late-in-the-distribution-chain product they purchased, because "[a]ll taxable distributors of OTP are taxed at the same rate and on a tax base determined in the same fashion." *Id.*

Third, the court said that distributors are treated the same regardless whether they are residents of Colorado: "Out-of-state manufacturers or distributors may engage in commerce within Colorado without suffering any burden from which local distributors or manufacturers are exempted." *Id.* 10a. The appeals court made no attempt to explain how that observation was applicable to McLane's Commerce Clause claim. McLane, after all, is an in-state firm headquartered in Colorado; and its suit is based not on a claim that it is suffering burdens not imposed on similarly situated competitors, but on a claim that it is bearing an increased tax burden solely because its OTP arrives in Colorado relatively late in the distribution chain.

The Colorado Supreme Court denied a petition for review on January 9, 2006. *Id.* 26a-27a.

REASONS FOR GRANTING THE PETITION

This case presents issues of exceptional importance, both to the many businesses enterprises whose tax assessments are based at least in part on the interstate nature of their business activities, and to State and local officials who seek to ensure

that their tax systems impose a fair share of the tax burden on such enterprises without running afoul of the Commerce Clause. While the Court has invoked the "dormant Commerce Clause" to restrict taxation of interstate commerce in a wide variety of situations, at its heart that clause is designed to prevent taxation that facially discriminates against interstate commerce. Yet, as this case well illustrates, there is widespread confusion in the state courts regarding just what constitutes "facial discrimination." Indeed, the fact that the Colorado courts, as well as courts from a number of other states, could fail to recognize the transparently discriminatory features of the excise tax scheme being challenged here, underscores the extent of the confusion regarding when a tax scheme should be condemned as facially discriminatory. Review is warranted to provide guidance that could go a long way in clearing up the confusion.

The Court has often spoken of the need for bright-line rules in this area of constitutional law, to reduce litigation and to permit businesses and taxing authorities to engage in long-term planning with a clearer understanding of their rights and responsibilities under the Commerce Clause. The bright-line rule sought in this case – that increased tax burdens imposed on interstate commerce are just as discriminatory when imposed through use of increased tax bases as they are when imposed through use of increased tax rates – is fully supported by the Court's dormant Commerce Clause decisions and would provide an easy-to-apply rule that should reduce litigation significantly. Moreover, the proposed bright-line rule would not impair the ability of State and local governments to raise revenues; they have available to them numerous alternative tax structures that avoid discrimination against interstate commerce yet would be likely to raise revenues comparable to those raised by the challenged scheme.

This Petition provides a particularly good vehicle for addressing the issue of what constitutes facial discrimination against interstate commerce. There is nothing interlocutory about the case; a final judgment has been entered against McLane. Respondents suggest that review is inappropriate because the case presents "an insufficient record and a unique factual situation." Opp. Br. 13. To the contrary, the record is as complete as it is likely ever to be: WLF is unaware of any material factual disputes between the parties, and Respondents do not suggest any. Both parties moved in the trial court for summary judgment with the understanding that there were no disputed issues of material fact and that they disagreed only about the applicable law. Moreover, the Colorado courts have established a rule that is broadly applicable to all distribution chains, not simply to business entities whose situation is identical to McLane's. Furthermore, Respondents have conceded that their excise tax scheme is not "unique" but rather is similar to tax schemes adopted by "many other states." *Id.* at 3. Under those circumstances, there is no good reason to defer resolution of the clear legal issues raised by this Petition.

I. REVIEW IS WARRANTED TO CLEAR UP WIDESPREAD CONFUSION REGARDING WHAT CONSTITUTES "FACIAL DISCRIMINATION" AGAINST INTERSTATE COMMERCE

The Constitution's Commerce Clause (Art. I, § 8, cl. 3) grants Congress the broad authority to regulate interstate commerce, including the power to regulate State taxation of interstate commerce. The Court has long understood the Commerce Clause also to include a "negative" aspect – that is, even in the absence of congressional action, it imposes limitations on State authority to impose regulatory measures that unduly burden interstate commerce for the benefit of in-

state economic interests. *See, e.g., Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996).

The Court has articulated a variety of tests to determine the point at which a burden on interstate commerce becomes constitutionally impermissible, leading to no small degree of confusion in the law. That confusion, as well as the absence of any clear textual support for the "negative" aspect of the Commerce Clause, has led some Justices to suggest that the Court should avoid further expansion of the negative Commerce Clause. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring in the judgment). Instead, those Justices have advocated focusing enforcement of the negative Commerce Clause primarily on those cases in which State law "facially discriminates against interstate commerce." *Id.* While a majority of the Justices has never endorsed such a formal retrenchment, the Court nonetheless has made absolutely clear that State regulations that facially discriminate against interstate commerce are particularly disfavored under the negative Commerce Clause. Just last term, the Court explained:

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."

Granholm v. Heald, 544 U.S. 460, 472 (2005) (quoting *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994)).

One of the supposed virtues of the rule flatly prohibiting "facial discrimination" against interstate commerce is that it is thought to provide a "clear, rational line" between permissible

and impermissible forms of State regulation. *West Lynn Creamery*, 512 U.S. at 212 (Scalia, J., concurring in the judgment). But the rule cannot continue to serve that purpose unless the Court is willing to step forward periodically and provide guidance regarding what constitutes "facial discrimination." The circumstances of this case suggest that such guidance is urgently needed.

By any objective measure, Colorado's excise tax treats the handling of OTP arriving from out-of-state less favorably than it treats the handling of OTP already present in the State. Moreover, that less favorable treatment can only be deemed "facial" in the sense that the fact of less favorable treatment is apparent from the face of the excise tax statute, without any need to rely on information not set forth in the statute. Section 102 makes clear that it is the act of bringing OTP into the State (or the manufacture of OTP within Colorado) that causes the tax to be levied.[3] Section 102 further provides that the tax is to be imposed at a rate of 20% of the "the manufacturer's list price," a term that the Colorado Court of Appeals authoritatively construed to mean the price paid by the distributor for the OTP it receives. Pet. App. 12a-13a. Accordingly, it is apparent from the face of the excise tax statute that a distributor who brings OTP into Colorado at a later stage of the distribution chain (when the price has already been marked up to reflect the distribution, sales, and promotional activities of earlier distributors) will pay a higher excise tax than will a distributor who brings identical OTP into

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[3] Section 39-28.5-101, by defining "the distributer" (upon whom the tax is levied under § 102) as limited to the entity that *first* brings the OTP into Colorado, makes clear that the excise tax may only be applied once on any given shipment of OTP, regardless of how many times it changes hands among distributors within Colorado before reaching a retailer.

Colorado at an earlier stage of the distribution chain. Indeed, as noted above, the court of appeals readily recognized that that is precisely the effect of the excise tax. Pet. App. 6a.

In light of the appeals court's clear understanding of how the statute operated, its failure to deem the statute facially discriminatory against interstate commerce can only be attributed to confusion regarding what constitutes the "facial discrimination" that this Court has so often and so roundly condemned. The extent of that confusion is underscored by the appeals court's citation to decisions from other State courts that have rejected Commerce Clause challenges to similar excise tax schemes. *Id.* 10a-12a (citing *Kansas Tobacco-Candy Distributors & Vendors, Inc. v. McDonald*, 214 Kan. 67, 73 (1974); and *McLane Co. v. Washington State Dep't of Revenue*, 105 Wash. App. 409, 414-15 (2001)).

As the petition more than adequately explains, the decision below was rendered in the face of seemingly clear precedent from this Court condemning State taxation as "facially discriminatory" in closely analogous factual situations. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Armco, Inc. v. Hardesty* , 467 U.S. 638 (1984). Rather than repeating in full McLane's explanation regarding why the decision below conflicts with those cases, WLF wishes to make a few brief comments. First, both the appeals court and Respondents argue that *Halliburton* is distinguishable because a key factor relied on by the Court in *Halliburton* (the tendency of the state tax to pressure out-of-state entities to move their operations to the taxing state) is not present here. Pet. App. 8a; Opp. Br. 10-11. They assert that UST Sales would never be tempted to open a facility in Colorado because doing so would render it subject to the OTP excise tax. *Id.* That argument makes no sense. As noted above, § 101 bars multiple applications of the excise tax to a

single OTP shipment, even if it changes hands several times within Colorado. Thus, if UST Sales opened a facility in Colorado and the OTP excise tax were imposed on UST Sales, then the tax would not also be imposed on McLane. In that event, UST Sales would pay a far lower excise tax (based on its purchase price from UST Manufacturing) and would include that tax in the price it charged McLane. Even with that increased price, the net cost to McLane (after taking into account its own tax savings) would be considerably less than the current price. Accordingly, the current structure of the excise tax provides UST Sales with a strong incentive to open up a Colorado facility – even though doing so may cause it to forgo cost savings that may well accrue from maintaining a single nationwide distribution facility. *See Halliburton*, 373 U.S. at 72 (the discriminatory Louisiana tax could lead to "fractionalization" of the out-of-state firm's operations, a result "destructive of the very purpose of the Commerce Clause.").

Second, the appeals courts' rationale for deeming the OTP excise tax non-discriminatory conflicts with numerous decisions of this Court. The appeals court reasoned that no discrimination against interstate commerce exists in this case because "[a]ll taxable distributors of OTP are taxed at the same rate and on a tax base determined in the same fashion." Pet. App. 7a. But this Court has determined in numerous cases that a State tax facially discriminated against interstate commerce even though the State's tax *rate* on interstate commerce was identical to or less than the tax rate imposed on comparable in-state activities. *See, e.g., Halliburton*, 373 U.S. at 70 (the fact of identical tax rates is not controlling; "equality for the purposes of competition is measured in dollars and cents, not legal abstractions"); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 169 (1999) (corporate franchise tax discriminated against out-of-state corporations, even though tax rate imposed on out-of-state corporations was less than 1/3

the franchise tax rate imposed on domestic corporations). Moreover, the appeals court's statement that a tax qualifies as nondiscriminatory simply because the tax base is determined in the same fashion for all businesses cuts against this Court's entire line of tax discrimination cases. Challenged taxes virtually always treat all businesses in accordance with a uniform set of rules and permit *any* business to reduce the tax burden by altering its business operations (such as by moving some of its operations in-state). But the ability of businesses to avoid discriminatory taxation in that manner has never been deemed sufficient to avoid application of the dormant Commerce Clause.

In sum, the decision below, as well as other state court decisions relied on by the court of appeals, sharply conflict with decisions of this Court that prohibit State taxes that facially discriminate against interstate commerce, and suggest widespread confusion regarding what constitutes facial discrimination. Review is warranted to clear up that confusion.

II. REVIEW IS WARRANTED BECAUSE ESTABLISHMENT OF BRIGHT-LINE RULES REGARDING FACIAL DISCRIMINATION PROMOTES STABILITY AND REDUCES LITIGATION

Quite apart from the need to clear up widespread confusion regarding what constitutes "facial discrimination," review is warranted because the establishment of bright-line rules of the sort requested by McLane serve important societal interests. The petition requests the Court to address – and to create a bright-line rule regarding – whether State taxes that have the effect of imposing a differential tax burden on interstate commerce by increasing the tax base of that

commerce in comparison to the tax base of in-state activities, should be deemed facially discriminatory. Establishing a bright-line rule on that issue, which (as McLane demonstrates) has arisen in many different states, would reduce litigation in this area and provide stability in the law, and thereby would permit both States and businesses to engage in long-term planning with a clearer understanding of their rights and responsibilities under the Commerce Clause.

The Court recently addressed the value of bright-line Commerce Clause rules, in a slightly different but closely related context. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), addressed the issue of whether a "substantial nexus" existed between the taxing State and the activity to which the tax was to be applied.[4] The Court recognized that drawing a line between cases in which the nexus is sufficiently substantial and those in which it is not can be a somewhat arbitrary exercise. Nonetheless, the Court also recognized that drawing a clear line *somewhere* has substantial virtue because doing so reduces litigation and permits parties to engage in long-term planning in reliance on a clear rule. Accordingly, the Court affirmed a bright-line rule that it had established 25 years earlier in *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967) – that a State may not impose a duty to collect use taxes on a seller if the seller's only connection with customers in the taxing State is by common carrier or the U.S. mail – even though it recognized that the *National Bellas Hess* rule was somewhat arbitrary and based on outmoded, "formalistic" notions regarding the scope of the

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[4] The "substantial nexus" test is one of the four tests that a challenged State tax must pass in order to survive a negative Commerce Clause challenge. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Another one of the four *Complete Auto* requirements is that the tax not discriminate against interstate commerce. *Id.*

Commerce Clause. *Quill*, 504 U.S. at 314-16. The Court determined that *National Bellas Hess*'s bright line rule "further[ed] the ends of the dormant Commerce Clause," *id.* at 314, explaining:

> Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges. . . . This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning these taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire," and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959). Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals.

Quill, 504 U.S. at 315-16.

Similarly, the bright-line rule requested by McLane would decrease litigation and encourage settled expectations. Colorado contends that taxing schemes that can (as the court of appeals recognized in this case) lead to increased tax burdens on interstate commerce should not be deemed facially discriminatory when they arise due merely to unequal tax bases and not uneven tax rates. It is theoretically possible that in some case a State could demonstrate that uneven tax bases that favor in-state entities should nonetheless be deemed not to constitute facial discrimination against interstate commerce.

But to allow case-by-case adjudication of that issue would encourage increased litigation and prevent the creation of settled expectations in the area. Review is warranted to determine whether States and businesses would be better served by creating a bright-line rule that unequal tax bases are to be treated the same as unequal tax rates in determining whether a State tax facially discriminates against interstate commerce.

Moreover, the proposed bright-line rule would not impair the ability of State and local governments to raise revenues; they have available to them numerous alternative tax structures that avoid discrimination against interstate commerce yet would be likely to raise revenues comparable to those raised by the challenged scheme. For example, Colorado could adopt a statute that imposes the OTP excise tax on the final distributor that provides the product directly to the retailer, and bases its tax on the amount paid by the final distributor for the product. Such a scheme would raise at least as much revenue as the current excise tax, yet would ensure that all distribution chains would be taxed the same – without regard to the percentage of the distribution process that takes place in Colorado.

III. THIS CASE PROVIDES A PARTICULARLY GOOD VEHICLE FOR ADDRESSING THE ISSUE RAISED BY THE PETITION

Review is warranted for the additional reason that the case provides a particularly good vehicle for addressing the issue raised by the petition.

First, there is nothing interlocutory about the petition. A final judgment has been entered against McLane, so denial of the petition will not result in further development of the record.

Respondents suggest that review is inappropriate because the case presents "an insufficient record and a unique factual situation." Opp. Br. 13. That contention is without merit. The record here is as complete as it is ever going to be in a case of this sort. Respondents have not suggested any types of evidence, absent from the record in this case, that would facilitate the Court's consideration of the discriminatory effects of shifting tax bases. WLF is unaware of any material factual disputes between the parties, and Respondents do not suggest any. Both parties moved in the trial court for summary judgment with the understanding that there were no disputed issues of material fact and that they disagreed only about the applicable law. Under those circumstances, there is no reason to defer consideration of the issue presented in hopes of finding a case with a complete trial record raising the same issue.

Nor is there any reason to conclude that this case presents a "unique factual situation." The Colorado courts in this case have established a rule that is broadly applicable to all distribution chains, not simply to business entities whose situation is identical to McLane's. They have determined that the Commerce Clause does not limit the power of a State to impose a greater tax burden on distribution chains that entail bringing a product into the State at the tail end of the distribution chain, than on distribution chains that entail bringing an identical product into the State earlier in the distribution chain. That rule is broadly applicable to large number of firms doing business in Colorado.

Furthermore, Respondents have conceded that their excise tax scheme is not "unique" but rather is similar to tax schemes adopted by "many other states." *Id.* at 3. Given the broad-based applicability of the issue raised by the petition, review by this Court is fully warranted.

Nor does the fact that UST Manufacturing and UST Sales are related entities counsel against granting review. As noted above, the Colorado Court of Appeals made clear that the issue of the relationship between UST Manufacturing and UST sales had not been raised by the parties and consequently played no role in its decision. Pet. App. 3a. Accordingly, the Commerce Clause rule established by the courts below applies broadly to all distribution chains, not simply to those involving two or more affiliated corporations; and thus the cert-worthiness of this case is unaffected by the fact that two (non-party) corporations involved in the distribution chain are related. Indeed, while Respondents' opposition brief repeatedly mentions that UST Manufacturing and UST Sales are related entities, evidently in hopes that doing so will somehow diminish McLane's claims, nowhere do Respondents suggest that the transactions between the corporations are anything other than arms-length or otherwise explain how they think the corporate relationship between UST Manufacturing and UST Sales affects the Commerce Clause analysis.

Moreover, as noted above, the excise tax scheme creates pressure on UST Sales to establish facilities in Colorado, and nowhere do Respondents present any argument suggesting that the relationship between UST Manufacturing and UST Sales should prevent those involved in the OTP distribution chain from relying on such a move of facilities as a basis for slashing excise tax payments by the OTP distribution chain.

In sum, should the Court determine that it wishes to take up the issue presented by the petition, this case provides an excellent vehicle for doing so.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

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